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SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-267

RALPH STEPHENS ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Ralph Stephens, petitioner herein, prays that a writ of certiorari issue to review the opinion of the Court of Appeals of Kentucky rendered March 31, 1975 in the above entitled case, petition for rehearing having been denied and mandate affirming the judgment of the lower court, Montgomery Circuit Court, having been entered May 23, 1975.

OPINION BELOW

The opinion of the Court of Appeals of Kentucky, reported in 522 S.W.2d 181 (1975), is printed as Appendix A attached hereto.

JURISDICTION

On October 7, 1974, petitioner Ralph Stephens was convicted of the offense of feloniously breaking and entering a dwelling house with intent to steal therefrom by a jury in the Montgomery Circuit Court. A timely appeal was taken to the Court of Appeals of Kentucky and on March 21, 1975 the Court of Appeals of Kentucky rendered the opinion printed in Appendix A which petitioner desires this Court to review. A petition for rehearing of the appeal was filed with the Court of Appeals of Kentucky, on April 18, 1975. The petition for rehearing was denied May 23, 1975, with the Court of Appeals of Kentucky affirming the judgment of conviction in the Montgomery Circuit Court and issuing a mandate certifying such order to the Montgomery Circuit Court (Appendix B).

The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTION PRESENTED

Did the Kentucky courts err in permitting the introduction into evidence of a watch and two rings seized pursuant to a search warrant when the watch and rings were not described in the search warrant as required by the Fourth Amendment to the Constitution of the United States, and it was not "immediately apparent" to the searching officers that they had before them incriminating evidence?

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States.

STATEMENT

Ralph Stephens, the petitioner herein, was indicted in the Montgomery Circuit Court, Mt. Sterling, Kentucky, on September 14, 1974, charged with feloniously breaking and entering the dwelling house of Les Branham with intent to steal therefrom in violation of Kentucky Revised Statutes, Section 433.180 (Appendix C). A jury trial in the Montgomery Circuit Court on October 7, 1974 resulted in a jury verdict of guilty and punishment was fixed at confinement in the penitentiary for a period of six years.

After indictment but prior to trial and on October 1, 1974, the petitioner filed in the Montgomery Circuit Court a motion to suppress as evidence (Appendix D) all articles seized under a search warrant dated July 18, 1974 issued from the Rowan Quarterly Court, Morehead, Kentucky (Appendix E) and signed by Calvin R. Lytle, identified as Magistrate, District No. 2, Rowan County, because (1) Calvin R. Lytle as Magistrate, District No. 2, had no authority to issue the search warrant and (2) the articles seized from the residence of the petitioner were not those enumerated and described in the search warrant.

A hearing upon this motion to suppress was held on October 4, 1974 at which the magistrate issuing the search warrant testified as did members of the Kentucky State Police who conducted the search.

The following facts were established by the testimony introduced at this hearing and at the jury trial (Agreed Statement Pursuant to RCr 12.72, Appendix F).

The Kentucky State Police officers testified that a number of articles were seized from the petitioner's resi-

dence pursuant to the search warrant which were not listed or described on the search warrant or the affidavit upon which the search warrant was issued and of these articles a ladies' wrist watch and two ladies' rings were identified by Les Branham at the trial as having been taken from his residence. Nothing listed on the search warrant and affidavit for the search warrant as stolen property was found in petitioner's home or seized pursuant to the search warrant.

The officers further testified that the ladies' watch and two ladies' rings identified by Les Branham as having been stolen from his residence had no unusual or identifying marks on them which would lead the officers to believe them to be stolen and it was only after the watch and two rings were shown to Les Branham days later that the officers had any reason to believe the items might have been stolen.

When this case was called for trial October 7, 1974, the trial court overruled petitioner's motion to suppress the evidence seized under the search warrant of July 8, 1974 and upon the trial of the case permitted, over petitioner's objection, the introduction into evidence of the ladies' wrist watch and two ladies rings seized under the search warrant and later identified by Les Branham as having been taken from his residence.

Without the introduction into evidence of the ladies' wrist watch and two ladies' rings seized under the search warrant, the Commonwealth agreed with petitioner that he would have been entitled to a dircted verdict of not guilty since no other proof was introduced connecting him with the offense alleged in the indictment.

On October 8, 1974, petitioner filed and served a motion and grounds for new trial in the Montgomery Circuit Court assigning among other errors that the trial court erred in failing to suppress the evidence seized under the search warrant dated July 18, 1974 due to the illegal search and seizure conducted at petitioner's home. The trial court overruled petitioner's motion and grounds for a new trial and entered judgment against him pursuant to the jury verdict (Appendix G).

On October 31, 1974, petitioner filed his notice of appeal to the Court of Appeals of Kentucky. The petitioner on appeal raised three issues before the Court of Appeals of Kentucky. (1) Did Calvin R. Lytle as Magistrate, District No. 2, Rowan County, Kentucky, have the legal authority to sign a search warrant issued from the Rowan Quarterly Court?

(2) Did Magistrate Lytle's lack of comprehension of "probable cause" in issuing the search warrant, deprive petitioner of his protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Section 10 of the Constitution of Kentucky?

(3) Did the trial court err in permitting the introduction into evidence of the watch and two rings seized pursuant to the search warrant when the property seized was not described in the search warrant and it was not "immediately apparent" to the searching officers that they had before them incriminating evidence?

The Court of Appeals of Kentucky ignoring federal precedent, including opinions of this Court to the contrary

on issue 3, upheld the trial court on all three issues and on March 21, 1975, rendered its opinion affirming the judgment of the trial court (Appendix A).

Petitioner next filed a petition for rehearing in the Court of Appeals of Kentucky on April 18, 1975, which was denied May 23, 1975 (Appendix B).

GROUNDS FOR CERTIORARI

1. This petition involves a unique situation arising under the Fourth Amendment to the Constitution of the United States:

> May police officers searching a residence pursuant to a search warrant which describes certain things seize other things not described in the warrant where none of the things described is seized, no arrest is made and it is not immediately apparent to the searching officers that the things seized are contraband, stolen property or otherwise illegally possessed by the homeowner?

Although this court has not ruled directly upon this factual situation, opinions in related matters indicate that such seizure is illegal as violating the homeowner's constitutional rights protected by the Fourth Amendment. It is important that this specific question be decided.

2. The Court of Appeals of Kentucky in holding that such seizure was legal has failed to follow the precedents of this Court as stated in *Marron* v. *United States*, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927); *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243

(1969) and *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), thus depriving petitioner of his constitutional rights.

ARGUMENT

THE COURT OF APPEALS OF KENTUCKY ERRED IN ITS OPINION APPROVING THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF THE WATCH AND TWO RINGS SEIZED PURSUANT TO THE SEARCH WARRANT WHEN NO ITEMS DESCRIBED IN THE SEARCH WARRANT WERE FOUND OR SEIZED, THE WATCH AND TWO RINGS WERE NOT DESCRIBED IN THE SEARCH WARRANT AND IT WAS NOT "IMMEDIATELY APPARENT" TO THE OFFICERS SEIZING THE WATCH AND TWO RINGS THAT THEY HAD INCRIMINATING EVIDENCE BEFORE THEM.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the* place to be searched, and the persons or *things to be seized,*" (Emphasis ours)

This constitutional protection of the citizens against unreasonable searches and seizures applies in state court proceedings. *Mapp* v. *Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

The Fourth Amendment requires that search warrants particularly describe the things directed to be seized

as indicated by *Marron* v. *United States*, 275 U.S. 192 (1926), 72 L.Ed. 231, 48 S.Ct. 74 (1927):

> "The requirement that warrants shall particularly describe the things to be seized makes general seizures under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The search warrant in this case directed an immediate search of petitioner's residence described in detail and a Buick automobile (described by license number) for the following personal property: "One 400 lb. floor safe, brand unknown, one muzzle loading rifle, one Westfield .20 ga. pump shotgun, one Golden Spike Winchester .30 .30 rifle, one 22 cal. Winchester magnum rifle, one Mossenburg & Sons .12 ga. single barrel lever action shotgun, one Hopkins and Allen .12 ga. single barrel shotgun, one Little Scout .22 cal. rifle, one Springfield .22 cal. rifle, one Marlin .22 cal. rifle, one Smith & Wesson .357 magnum revolver, serial No. 8049, one Smith & Wesson .38 cal. snub-nosed revolver, serial No. J57403, 6 men's suits, assorted colors and sizes, rare type coins ranging from pennies to silver dollars." (AppendixE).

The affidavit upon which the search warrant was issued described the same articles as listed upon the search warrant and stated that they had been stolen from the residence of Les Branham on April 7, 1974. The return on the search warrant merely recited: "Executed this 18th

day of July, 1974 by searching the within named premises, including the within named automobile. Several burglarious tools were found in the front and rear of said automobile and seized.

/s/ C.A. Thomas
Det. Sgt. C.A. Thomas, KSP"
(Appendix E)

Justice Pleas Jones, writing the opinion of the Court of Appeals of Kentucky in this case, disposed of petitioner's complaint as to the illegality of the seizure of the watch and two rings introduced into evidence as follows:

> "Finally, Stephens attacks the sufficiency of the search warrant because it did not describe the ladies' watch and two rings admitted into evidence. The search warrant described with particularity that 'coins ranging from pennies to silver dollars' had been taken from the house of Les Branham. In obedience to the command of the warrant, the officer took a metal box that was concealed in a hole in the wall. It was not likely that pennies or silver dollars would be laid end to end on a rafter. The most likely place for the containment of coins, watches, rings, and knives, would be a metal box. The box contained two rings and a ladies' watch which belonged to Branham. He did not identify the coins as those taken from him. Although the watch and rings were not specified in the search warrant, they were identified as items that had been stolen from the Branham home. Their

seizure and introduction into evidence was legal." (Appendix A).

After citing *Jones* v. *Commonwealth,* Ky., 416 S.W. 2d 342 (1967) as authority for the foregoing conclusion, the opinion continued:

> "The metal box, nestled among the cobwebs in the rafters, contained: 27 men's wrist watches, 38 ladies' wrist watches, 7 pocket knives, 7 men's rings, 22 ladies rings, 6 gold chains, 5 watch bands, 1 gold belt buckle and various other items. (Appendix A)

While the opinion of the Court of Appeals of Kentucky made no mention of the requirement of the Fourth Amendment to the United States Constitution and a similar requirement in Section 10 of the Constitution of Kentucky, which require search warrants to particularly describe the things to be seized, it appears that the Court attempted to avoid these constitutional protections and write around them by quoting from *Jones* v. *Commonwealth,* supra, as follows:

> *** "While engaged in a legitimate search under a search warrant describing specific articles, it is proper to seize stolen or contraband property or property constituting the fruits of the crime or instrumentalities of the crime, though the latter are not described in the warrant."

Jones, supra, was a companion case to *Bond* v. *Commonwealth,* Ky., 414 S.W. 2d 131 (1967) earlier decided. In *Bond,* supra, the search warrant directed the seizure of "any clothing, bed clothing, or articles containing blood

or signs of blood." Seized were a number of bloodstained articles of clothing and a small metal box containing an assortment of hand tools. The Court of Appeals of Kentucky held that the seizure of the tools were authorized under the wording of the search warrant since some of the tools had a rusty, red color which may have been bloodstains. In *Jones,* supra, the Court of Appeals of Kentucky held that the question of admissibility into evidence of the articles seized under the search warrant had been decided in favor of admissibility in *Bond,* supra. However, the opinion went on gratuitiously to set out the paragraph quoted above and cited in support of the statement *Harris* v. *United States,* 331 U.S. 145. 91 L.Ed. 1399, 67 S. Ct. 1098 (1946), and *Woo Lai Chun* v. *United States,* 274 F. 2d 708, (9th Cir. 1960).

The quotation from *Jones* v. *Commonwealth,* supra, does not make it clear that property not described in the search warrant may be seized, although none of the property described is seized.

Harris, supra, cited in support of *Jones,* supra, affords respondent no support because in that case the search was made incident to an arrest and since the search disclosed draft cards, immediately apparent as stolen, a crime was committed in the presence of the searching officers. In this case, *Harris,* supra, does not apply because the watch and rings were not seized incident to an arrest but were seized under a search warrant at a time when the seizing officer did not know they were stolen.

Nor does the opinion of the Court of Appeals for

the 9th Circuit in *Woo Lai Chun*, supra, support the opinion of the Court of Appeals of Kentucky, since in that case the conviction was reversed because certain letters seized during a search pursuant to a search warrant, but not described therein, were erroneously permitted to be introduced into evidence.

Without saying so in so many words, it may be that the Court of Appeals of Kentucky, speaking through Justice Jones, was attempting to justify its ignoring of the plain provisions of the Fourth Amendment to the United States Constitution by invoking the "plain view" doctrine.

In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S. Ct. 2022 (1971) this Court discussed at length various situations in which seizures may be legal although there was no valid search warrant describing the articles seized. It is submitted that none of these situations applies to the case at bar. The watch and rings were not seized incident to a lawful arrest. In fact petitioner was not arrested on the breaking and entering charge until July 23, 1974 five days after the seizure of the articles from his residence. (Appendix H).

Nor were the watch and rings in "plain view" as was the marijuana on the kitchen sink in *Ker* v. *California*, 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623 (1963). They were in a closed metal box upstairs in the residence and were not observed until the residence was searched and the box opened.

Nor was it immediately apparent to the searching officers that the watch and rings were contraband, stolen

property or the fruits of crime. The officers were not able to reach a conclusion that the property was stolen until several days later after identification by the owner. There was nothing distinctive about the watch or rings to immediately indicate ownership. The concurring opinion of Mr. Justice Stewart in *Stanley* v. *Georgia,* 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243 (1969) holds that articles seized while searching under a valid search warrant may not be seized if further inspection or investigation is necessary to determine that the articles are illegally possessed. In *Stanley,* supra, obscene films were seized but had to be projected upon a screen before the obscenity complained of could be identified and consequently they were not subject to seizure under the search warrant.

Nor were the watch and rings "inadvertently" discovered as happened in the *Harris* v. *United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968), where the opening of an automobile door to roll up a window disclosed a registration certificate identifying the car as stolen.

Nor is this a case where delay in securing a warrant for the watch and rings presents such an "exigent circumstance" as to justify seizure without a warrant. To quote again from the opinion of the Court of Appeals of Kentucky, the searching officer attempted to justify his actions in seizing the contents of the metal box by saying he knew that watches and knives had been taken from the Branham home. If such was the fact, nothing prevented the police from describing such articles in the affidavit for the search warrant and the warrant itself.

This they did not do. To quote from Coolidge, supra, (403 U.S. 741):

> "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'warrants . . . particularly describing . . . [the] things to be seized.' "

United States v. *Gray*, 484 F.2d 352 (6th Cir. 1973) cert. den. 414 U.S. 1158, an appeal from the United States District Court for the Eastern District of Kentucky, cited *Marron*, supra. The Court went on to say, however, that *Marron* fails to recognize the plain view doctrine, now well established in the law of search and seizure. The opinion then quoted from Mr. Justice Stewart in *Coolidge* v. *New Hampshire*, 403 U.S. 443 at 466, 91, S.Ct. 2022, 29 L.Ed. 2d 564 (1971):

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of *evidence incriminating the accused*.. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only when it is *immediately apparent to the police that they have evidence before them*; the 'plain view' doctrine may

not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." (Emphasis added)

In *Gray*, supra. a Kentucky state trooper received information that the operator of a small grocery store in rural Fayette County was selling beer without a license. A plainclothes man purchased several cans of beer, procured a search warrant and the troopers returned to the store to arrest Gray and execute the search warrant which directed the seizure of "any intoxicating liquors, apparatus for manufacturing intoxicating liquors or materials used in the manufacture of intoxicating liquors." After locating and seizing a quantity of beer in a cooler, a trooper proceeded to search the upper level of the building. No alcoholic beverages were found in the upper residence area but while the trooper was conducting the search he noticed two rifles leaning against the wall in an upstairs closet and copied their serial numbers. Hours later the serial numbers were run through the computer of the National Crime Information Center and it was learned that the firearms were stolen in Tennessee. A search warrant was obtained for the rifles, they were seized and Gray was charged with and convicted for violation of the federal firearms law.

The Circuit Court of Appeals in reversing the conviction, held that when the facts were analyzed under the plain view doctrine, the seizure of the rifles could not be justified. In discussing the plain view doctrine, the Court said that the first prong of the doctrine must be a prior justification for an intrustion, in that case a legitimate search warrant. The Court went on to hold:

"The second prong of the doctrine requires that

during the search the officers 'came indavertently across a piece of evidence incriminating the accused'. Further 'the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them.' Here, Officer Brodt inadvertently discovered the rifles in the upstairs clothes closet while searching for alcoholic beverages but it was not 'immediately apparent that the rifles were evidence incriminating the accused.' The rifles were not contraband; there was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers at that time have any knowledge that the rifles were evidence of any other crimes. It was only after Trooper Brodt had seized the weapons, copied down the serial numbers, left the defendant's premises, and then run the information taken off the rifles through the National Crime Information Center that he learned that they were stolen and hence incriminating. This can hardly be characterized as being 'immediately apparent.' To allow the police to seize objects, unincriminating at the time of seizure, would not in our view comport with the plain view doctrine."

An identical factual situation exists in the case at bar. The watch and two rings seized were not listed in the search warrant, and they were not identified as being stolen until some time later when they were exhibited to Les Branham. Consequently, at the time the watch and rings were seized, it was not "immediately apparent" that they were "evidence incriminating the accused." The only

reason advanced by the officer seizing the watch and rings was:

"Q. Can you point to one single item that made you think it was taken from the Branham residence other than the fact it was concealed?

A. That . . . the fact that it was concealed, there were watches in there, there was knives in there, I knew that there had been some watches taken, I believe there had been some knives taken also from the Branham home, and that was the reason we was there, to look for those items stolen from his home." (Appendix A)

Since none of the items described in the search warrant as having been stolen from the Branham home was found in the Stephens residence, and since there was no identification of any kind upon any of the articles in the metal box to conect them with Branham, surely the suspicion on the part of the searching officer was not sufficient to convert the articles in the metal box into "incriminating evidence".

It may be noted that all of the other items seized from appellant's home have been returned to the petitioner with the exception of a watch which has not been identified as stolen property.

No property described in the search warrant was seized by the officers raiding appellant's home and at the time of their seizure it was not immediately apparent to the officers that the watch and two rings were evidence incriminating the accused, thus the search became a general or exploratory one which is prohibited.

Attorneys for petitioner are not advised as to the position of the Attorney General of Kentucky upon the issue presented in this petition since, upon the appeal to the Court of Appeals of Kentucky, the Attorney General admitted error with respect to the first issue raised on appeal which questioned the authority of Calvin R. Lytle as Magistrate, District No. 2, Rowan County, Kentucky to issue a search warrant from the Rowan Quarterly Court. This admission of error on the part of the Attorney General made other issues raised on appeal moot. (Appendix I).

CONCLUSION

There is no intermediate appellate court in Kentucky and the Court of Appeals of Kentucky hands down more opinions annually than any other state court of last resort. The press of time may account for the fact Justice Jones in his opinion in this case dealing with the issue presented here failed to mention the Fourth Amendment to the Constitution of the United States. It may account for the fact that the only citation in support of the court's conclusion that the seizure of the watch and rings was valid, was dictum not supported by the federal cases cited. It may account for the fact that his opinion totally ignored the opinions of this court in *Marron* v. *United States,* 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927); *Stanley* v. *Georgia,* 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) and *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) although attention was invited to them by petitioner's counsel.

It is the hope of petitioner that this Court will not permit further erosion of the rights of the individual pro-

tected by the Fourth Amendment to the United States Constitution. As Mr. Justice Stewart said in *Stanley*, supra:

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant."

We respectfully urge this Court to note probable jurisdiction upon the issue advanced in this petition and to order plenary consideration of this case.

Respectfully submitted,

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COUNSEL FOR PETITIONER

PROOF OF SERVICE

I, Lewis A. White, one of the attorneys for Ralph Stephens, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 18th, 1975 the foregoing Petition for Writ of Certiorari and the Appendix thereto was served upon the respondent, Commonwealth of Kentucky, by mailing three copies to Hon. Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, and by mailing three copies to Hon. James E. Clay, Commonwealth Attorney, 21st Judicial District, Morehead, Kentucky 40351, all with postage prepaid.

Lewis A. White

LEWIS A. WHITE JR.